92-1777

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

YONG WOO JUNG, aka CHARLES JUNG,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner was denied effective assistance of counsel when his attorney advised him to waive a jury trial because a wealthy Korean cannot receive a fair jury trial in San Diego?

2. Whether the U.S. District Court erred at the 28 U.S.C. 2255 motion hearing by not finding a denial of Petitioner's constitutional right to effective assistance of counsel based on counsel's waiver of jury trial because counsel believed a wealthy Korean cannot receive a fair jury trial in San Diego?

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OPINIONS

The Decision of the United States Court of Appeals for the Ninth Circuit affirmed the trial court's decision that two defendants sharing one interpreter did not violate defendants' rights under the Fifth and Sixth Amendments, that knowledge of right to participate in selection of jurors is not constitutionally required for a knowing, voluntary and intelligent jury waiver; and that the trial court properly aggregated currency exchanged in various transactions was decided on January 10, 1992. *United States v. Jung, sub nom, United States v. Shin,* 953 F.2d 559 (9th Cir. 1992). (App. A) The Memorandum Decision (Not For Publication) of the United States Court of Appeals for the Ninth Circuit affirming the trial court's denial of Petitioner's 28 U.S.C. 2255 motion that he was denied effective assistance of counsel in violation of his Sixth Amendment rights was filed on February 11, 1993. *Yong Woo Jung, aka Charles Jung v. United States of America,* (9th Cir. No. 92-55562, February 11, 1993). (App. B)

JURISDICTIONAL STATEMENT

On February 11, 1993, the Ninth Circuit Court of Appeals denied Petitioner's 28 U.S.C. 2255 Motion. Jurisdiction is conferred on this Court to review Certiorari by Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself,* nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (Emphasis added.)

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the assistance of counsel for his defense.* (Emphasis added.)

STATEMENT OF THE CASE

Judge Leland C. Nielsen, sitting without a jury, convicted the Petitioner on June 6, 1990. The Petitioner originally entered a plea of "not guilty" to all twenty-nine (29) criminal counts. The judgment and conviction were dated June 18, 1990. The conviction list is as follows:

> Count 1 – Conspiracy to Fail to File Currency Transaction Reports. 18 U.S.C. sec. 371 and 31 U.S.C. sec. 5313.
>
> Counts 2 – 18 – Failure to File Currency Transaction Reports. 18 U.S.C. sec. 5313, 18 U.S.C. sec. 5322(b), 18 U.S.C. sec. 2.
>
> Counts 19 – 28 – Money Laundering. 18 U.S.C. sec. 1956(a)(3)(c) and 18 U.S.C. sec. 2.
>
> Count 29 – Structuring Transactions to Evade Reporting Requirements. 18 U.S.C. sec 5324(3) and 18 U.S.C. sec. 2.

Judge Nielsen sentenced the Petitioner to fifty-one (51) months in prison for each count. All sentences run concurrently. The Petitioner is presently incarcerated and denied bail pending his Petition for Writ of Certiorari.

The Petitioner appealed his conviction to the United States Court of Appeals for the Ninth Circuit. The Court denied his appeal to overturn the convictions. *United States v. Jung, sub nom, United States v. Shin*, 953 F.2d 559 (9th Cir. 1992).

Through a 28 U.S.C. sec. 2255 Motion to Vacate Sentence collateral attack, the Petitioner brought trial error issues of constitutional dimension. The District Court, after an evidentiary hearing, denied the motion. Judge Leland Nielsen presided over the hearing.

The Petitioner then appealed the denial of his 28 U.S.C. sec. 2255 Motion to Vacate Sentence to the United States Court of Appeals for the Ninth Circuit. In a Memorandum Decision, (Not for Publication), the Court affirmed the trial court's denial of Petitioner's 28 U.S.C. sec. 2255 Motion to Vacate Sentence. *Yong Woo Jung, aka Charles Jung v. United States of America,* (9th Cir. no. 92-55562, February 11, 1993).

The Petitioner retained counsel through all critical stages of the judicial proceedings. Mr. Barton C. Sheela, Esq., of Sheela, Barranco & Sheela, 2368 Second Avenue, San Diego, California 92101, represented the Petitioner from arraignment through sentencing. Mr. Charles D. Mauer, Jr., Esq., of Mauer and Associates, Cabot, Cabot, and Forbes Corporate Center, 550 West "C" Street, Suite 1000, San Diego, California 92101, represented the Petitioner on appeal. Additionally, Oscar B. Goodman, Esq., of Goodman & Chesnoff, represented the Petitioner on appeal. Mr. Goodman represented the Petitioner at the 28 U.S.C. sec. 2255 Motion hearing, as well as the Ninth Circuit appeal of the denial of Petitioner's 28 U.S.C. sec. 2255 Motion. Mr. Goodman represents the petitioner on this Petition for Writ of Certiorari.

JURISDICTION BELOW

The District Court had "original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." 18 U.S.C. sec. 3231.

The Ninth Circuit Court of Appeals had jurisdiction over the appeal of the instant case, as a final judgment of the District Court, pursuant to Title 28 U.S.C. sec. 1291.

The Ninth Circuit Court of Appeals had jurisdiction over the 28 U.S.C. sec. 2255 motion pursuant to Title 28 U.S.C. sec. 2255.

STATEMENT OF FACTS

The 28 U.S.C. sec. 2255 hearing focused on violation of the Petitioner's constitutionally guaranteed rights. Almost immediately, Judge Nielsen concluded the Petitioner could communicate perfectly well in English. Judge Nielsen drew this conclusion without hearing any evidence. (*Motion Transcript*, pp. 3-4.) Judge Nielsen summarily concluded the Petitioner was not prejudiced because there was overwhelming evidence of his guilt. *Id.* at pp. 4-5. The Petitioner's counsel, Mr. Goodman, challenged the conduct of the trial counsel concerning the waiver of jury trial. Judge Nielsen summarily dismissed this grave accusation. *Id.* at p. 6.

Under direct examination, the Petitioner gave unequivocal evidence of derogation of his constitutional rights. He said he had difficulty understanding English. *Id.* at p. 7. Trial counsel confirmed the Petitioner's linguistic ineptitude. *Id.* at p. 48. *The Petitioner said his trial counsel told him he could not get a fair trial because he was Korean. Id.* at p. 9. Judge Nielsen did not canvass the Petitioner about the Petitioner's motivation for his waivers either at trial or at the 28 U.S.C. sec. 2255 hearing. *See, generally, United States v. Shin*, case no.

90-0061-N, trial transcript, (June 5-6, 1990); *see, generally, Motion Transcript.*

The Petitioner's wife confirmed Petitioner's testimony. She, too, was of the impression that Koreans could not get a fair jury trial. *Id.* at p. 24. Her trial counsel, Jan Ronis, Esq., bolstered the Petitioner's testimony. He said the Petitioner was advised by his trial counsel, Barton Sheela, Esq., that *wealthy foreigners involved in a trial with drug overtones could not receive a fair jury trial in San Diego. Id.* at p. 38. Mr. Ronis noted the Petitioner gave great deference to Mr. Sheela's decisions. This was because of and consistent with Petitioner's Oriental heritage. *Id.* at p. 39. Mr. Ronis testified the Petitioner felt threatened by his attorney's advice as it related to his waiver of a jury. *Id.* at p. 42.

Mr. Sheela, the Petitioner's trial counsel, testified there was no discussion regarding the relative merits between a trial by jury or before the bench.

During the 28 U.S.C. sec. 2255 arguments, Judge Nielsen indicated there may be a constitutionally significant problem. This was because Judge Nielsen did not canvass the Petitioner concerning his jury waiver. *Id.* at p. 60. Judge Nielsen summarily dismissed the importance of this problem. He simply put himself in the place of a "typical Korean" and concluded the jury waiver was valid. *Id.* at p. 61. Judge Nielsen attributes any constitutional infirmities to an "imperfect world." *Id.* at 61. His statements are merely conclusory. They do not reflect reasoned judgment.

REASONS FOR GRANTING WRIT

1. THE PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN ADVISED BY HIS ATTORNEY TO WAIVE TRIAL BY JURY BECAUSE A WEALTHY KOREAN CANNOT RECEIVE A FAIR JURY TRIAL IN SAN DIEGO.

A-1: INEFFECTIVE ASSISTANCE OF COUNSEL.

The Petitioner's trial counsel acted ineffectively. Trial counsel's advice regarding waiver of a jury trial constituted ineffective assistance.

The colloquy between the Court and Petitioner during the 28 U.S.C. sec. 2255 motion hearing demonstrates ineffective assistance. Trial counsel's actions denied the Petitioner the opportunity to afford himself a fair jury trial. The following exchange demonstrates the Petitioner's ineffective assistance claim due to waiver of a jury trial:

> Q: [Goodman] Mr. Jung, did you have occasion to discuss whether or not you should have a jury trial in your case before Judge Nielsen?
>
> A: [Petitioner] Very briefly.
>
> Q: Where did the discussion take place?
>
> A: Mr. Sheela's office.
>
> Q: How many days before your trial did this discussion take place?
>
> A: I do not remember exactly when. Maybe about two or three weeks before.
>
> * * *
>
> Q: Was there a discussion between the attorneys, yourself and your wife about a jury trial?

A: It was very brief.

* * *

Q: What was said about waiving a jury trial?

A: Since I am a Korean, if I take a jury trial, the judgment will not be made fairly.

* * *

A: Usually the Orientals or the Koreans who own a business, American people don't like Orientals who lead luxury life style.

Q: Is that the main reason that you did not have a jury trial?

A: Yes.

* * *

Q: Who made that statement about a Korean having difficulty getting a fair trial?

* * *

A: Mr. Sheela.

Motion Transcript, pp. 7-8.

A-2: RIGHT TO A TRIAL BY JURY AND INEFFECTIVE ASSISTANCE OF COUNSEL.

An ineffective assistance of counsel claim comprehends issues of constitutional significance. Therefore, courts inquire across a broad spectrum of facts. "[S]uch a claim [ineffective assistance] cannot be advanced without the development of facts *outside the original record.*" *United States v. Houtchens*, 926 F.2d 824, 828 (9th Cir. 1991) (emphasis added).

Claims challenging effective assistance of counsel are presumptively prejudicial because of the importance attached to these claims. Ineffective assistance cases reflect instances affecting the ability of the accused to have a fair trial. This includes cases where counsel's ineffective representation is functionally equal to no representation at all. The instant case is an example of this problem.

In a criminal case, certain decisions belong solely to the client. For example, the defendant, *himself*, must make the choice to enter a guilty plea. *See, Boykin v. Alabama*, 395 U.S. 238 (1969). A guilty plea must be voluntary, informed and personally entered by the defendant. Similarly, the decisions to waive a jury trial and to testify in one's own behalf belongs to the defendant. *See, Patton v. United States*, 281 U.S. 276, 298 (1930). Scholarly commentary urges trial counsel to fully and carefully advise the defendant about the consequences of these decisions. Steinberg & Paulsen, *A Conversation with Defense Counsel on Problems of a Criminal Defense*, 7 Prac. Law 25, 37 (May, 1961).

The American Bar Association recognizes the importance of the case law and scholarly commentary. When making certain trial decisions (whether to plead guilty, waive a jury or testify), the defendant should have the full and careful advice of his counsel. However, because of the crucial nature of these fundamental decisions, the defendant must make the ultimate determinations. The American Bar Association's standards explicitly state:

> (a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The

> decisions which are to be made by the accused after full consultation with counsel are:
>
> (i) what plea to enter;
>
> (ii) *whether to waive a jury trial;* and
>
> (iii) whether to testify in his or her own behalf.
>
> (Emphasis added.)

American Bar Association, *Standards for Criminal Justice,* ch. 4, sec. 5.2 (2nd. ed. 1980) (supp. 1986).

The Supreme Court recognizes the importance of the American Bar Association standards. The standards are specifically noted in *Alvord v. Wainwright,* 469 U.S. 956 (1984). *Alvord* reinforces the scope of an attorney's role; to act as an advisor and assistant. Further, counsel must ensure the accused is well-informed about the decisions which remain personal to himself. No less than *Alvord,* counsel's performance in the instant case is "unquestionably inappropriate and constitutionally ineffective." *Id.* at 961.

The Petitioner relied on trial counsel's representations. The trial attorney never bothered to counsel the Petitioner regarding fundamental decisions. Defense counsel did nothing to ensure the Petitioner was "reasonably well informed." In fact, the Petitioner had no factual basis for waiving his constitutional guarantees. *See, Motion Transcript,* pp. 7-8.

United States v. Loughery, 908 F.2d 1014 (D.C. Cir. 1990) applies the A.B.A. standards to an ineffective assistance of counsel claim. *Loughery* holds the A.B.A. standards apply equally to a guilty plea, waiver of jury trial or the right to testify.

The *Loughery* Court found that defense counsel acted ineffectively. They applied the test enunciated in *Strickland v. Washington,* 466 U.S. 668 (1984). The first portion of the *Strickland* test demands the defendant demonstrate counsel's representation fell below an objective standard of reasonableness. *See, Strickland v. Washington,* 466 U.S. at 687-88 (1984). According to *Loughery,* the defendant must identify the trial counsel's acts or omissions resulting from unreasonable judgment. The court must determine whether the acts were outside the range of professional judgment. The court should bear in mind that defense counsel's function is to promote the process of adversarial testing.

Defense functions are elaborated in prevailing professional norms. *See, generally, United States v. Loughery,* 908 F.2d at 1018 (1990) (citing *Strickland v. Washington,* 466 U.S. at 690 (1984)).

> Prevailing norms of practice, such as those reflected in the ABA Standards, may inform our determination of what is reasonable [performance by an attorney] . . . Specifically, counsel must thoroughly advise the client "concerning all aspects of the case . . ."

See, United States v. Loughery, 908 F.2d at 1018 (1990) (citing *Strickland v. Washington,* 466 U.S. at 688 (1984); American Bar Association, *Standards of Criminal Justice,* ch. 4, secs. 3.8, 5.1(a) (2nd ed. 1980)).

Prevailing norms mandate trial counsel permit the defendant to personally decide whether to waive a jury or testify on his own behalf. The *defendant, himself,* makes these decisions only after full and careful discussions *with*

his attorney. The instant case represents a complete disregard of the prevailing norms. The 28 U.S.C. sec. 2255 evidence clearly shows no discussions between the Petitioner and his trial counsel regarding waiver and testimony. *See, Motion Transcript*, pp. 7-8. The Petitioner's trial counsel appropriated these crucial decisions to himself. His performance was far below accepted norms.

The second prong of *Strickland* requires the defendant to show that, but for counsel's errors, the outcome would have been different. *Strickland*, at 687-88. The Petitioner would have requested a jury trial if advised that *voir dire* and peremptory challenges would ensure a fair trial. The Petitioner waived his right to a jury because defense counsel never fully or completely informed the Petitioner of his trial options. The argument becomes even more compelling because defense counsel never explained the ramifications of or differences between a jury trial and a bench trial.

Evidence supports the second prong of *Strickland*. It is probable the Petitioner would testify in his own behalf. The Petitioner maintained his innocence during this entire episode and never expressed interest in a guilty plea. His testimony would have permitted a full, fair and complete appraisal of his culpability.

There is a reasonable probability the result in the instant case would have been different. This is because the Petitioner waived a jury trial and did not testify in his own behalf. The Petitioner did not volitionally waive trial and refuse to testify. Defense counsel made these decisions before going to trial. He coerced the Petitioner into

abandoning his constitutional guarantees. Defense counsel undermined the adversarial testing process.

Jones v. Barnes, 463 U.S. 745 (1983) discusses ineffective assistance in the context of appellate rights. *Barnes* pinpoints the broad issue in this case; the relationship between lawyer and client. The Sixth Amendment requires counsel to protect the accused by *assisting* him. Counsel does not assist the defendant by making fundamental choices for him. The foundation of this philosophy is clear. When a lawyer usurps the defendant's fundamental decisions he "lead[s] [the accused] to believe that the law contrives against him." *Faretta v. California,* 422 U.S. 806, 834 (1975).

Trial by jury is a touchstone of our judicial system. *Batson v. Kentucky,* 476 U.S. 79 (1986) serves to illustrate the ineffectiveness of the Petitioner's counsel. *Batson* addresses the issue of peremptory jury challenges based solely on racial characteristics. However, *Batson* stands for a larger proposition. The *Batson* Court struck down purposeful discrimination of veniremen. That practice "violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." *Id.,* at 86.

Batson crystallizes the instant problem. Trial by jury is "a valuable safeguard of liberty" and "the palladium of free government." F. Heller, *The Sixth Amendment,* pp. 21-22, 25-26 (1951). The jury acts as a buffer between the accused and the state. Their function is fundamental to the proper administration of justice. Jury trial reflects "a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge . . . " The jury "in

serious criminal cases is a defense against arbitrary law enforcement." *See, generally, Duncan v. Louisiana,* 391 U.S. 145 (1968).

The prosecutor denied Batson a proper jury trial through improper use of peremptory challenges. In the instant case, Petitioner's counsel acted no less improperly. The Petitioner listened as his trial counsel told him that, unequivocally, wealthy Koreans could not get a fair trial.

Trial counsel, solely, made the determination that juries are incapable of understanding evidence or determining factual issues. *See, e.g., Duncan v. Louisiana,* 391 U.S. at 156 (1968). *Duncan* concluded that juries perform effectively in most every case and come to sound conclusions. The Petitioner's counsel concluded that juries are "quixotic" and "little better than a roll of the dice." *Duncan* at 156. Trial counsel never properly or intelligently discussed the differences between trial by jury or before the bench. Counsel completely foreclosed the Petitioner from participation in this critical decision. Counsel's actions denied the Petitioner a deep-rooted constitutional right.

The case of *United States v. Teague,* 953 F.2d 1525 (11th Cir. 1992) *cert. denied,* 113 S.Ct. 127 (1993) illustrates a situation where defense counsel prevented the accused from testifying in his own behalf, a critical decision within the criminal justice process. The *Teague* court considered whether defense counsel may waive a defendant's right to testify. *Teague* holds that certain decisions

are so fundamental they remain personal to the defendant. Only the defendant can waive these decisions. Fundamental decisions include entry of a guilty plea, (*see, Boykin v. Alabama,* 395 U.S. 238 (1969)), waiver of a jury trial, (*see, Adams v. United States ex rel. McCann,* 317 U.S. 269 (1942)), and pursuit of an appeal (*see, Fay v. Noia,* 372 U.S. 391 (1963)).

Teague reaffirms long-standing constitutional law. "[A] criminal defendant has a *fundamental* right to testify in his or her own behalf at trial. This right is personal to the defendant *and cannot be waived either by the trial court or the defense counsel. Teague* at 1532. *Teague*'s holding is grounded on an impressive pedigree. "[T]he [Supreme] Court noted that it has '[o]n numerous occasions . . . proceeded on the premise that the right to testify on one's own behalf in defense to a criminal charge is a *fundamental constitutional right.*' " *United States v. Teague,* 953 F.2d at 1531 (11th Cir. 1992) *cert. denied,* 113 S.Ct. 127 (1993) (citing *Rock v. Arkansas,* 483, U.S. 44, 53 n.10 (1987) (quoting *Faretta v. California,* 422 U.S. 806, 819 n.15 (1975)) (emphasis in the original).

In the instant case, trial counsel prevented the Petitioner from his right to a jury trial. The *Teague* court takes specific note of the A.B.A. *Standards for Criminal Justice, supra. United States v. Teague,* 953 F.2d at 1533 (11th Cir. 1992) *cert. denied,* 113 S.Ct. 127 (1993). They conclude that defense counsel acts as an *assistant* to the defendant when deciding such a critical decision as jury waiver. Defense counsel must advise the defendant of his right to testify or not to testify. Further, counsel must advise his client of the strategic implications of each choice. To perform otherwise is ineffective assistance of counsel. *Id.* at 1534.

In the instant case, the Petitioner's counsel did not act as an assistant. He never advised the Petitioner of his right to a jury trial with a fair and impartial jury being selected. The *Teague* holding is directly on point by interpolating the right to testify with the right to a jury trial:

> [I]f defense counsel never informed the defendant of the right to [a jury trial], and that the ultimate decision belongs to the defendant, counsel would have neglected the vital professional responsibility of ensuring that the defendant's right to [a jury trial] is protected and that any waiver of that right is knowing and voluntary. *Under such circumstances, defense counsel has not acted " 'within the range of competence demanded of attorneys in criminal cases,' " and the defendant has not received reasonably effective assistance of counsel.*

Id. at 1534.

Teague is further instructive on the factors for determining when trial counsel denies the defendant his [right to a jury trial]. The defendant (1.) must be advised of the right to [a jury trial] by his attorney, (2.) must be counseled on the ramifications of a [jury trial], (3.) must not protest, and, (4.) must have his will overborne by defense counsel. *Id.* at 1535.

The instant case is even more egregious than the *Teague* situation. The Petitioner was not advised of his right to a jury trial by his counsel. In essence, the decision to waive was made by his attorney and not by him, and the District Court Judge did nothing to ameliorate what was taking place.

Trial counsel incorrectly believed that Koreans could not receive a fair jury trial in San Diego. However, the Supreme Court clearly permits a judge to *voir dire* potential jurors about racial prejudice.

> [T]he essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that under the facts shown in this record the petitioner be permitted to have the jurors interrogated on the issue of racial bias.

Ham v. South Carolina, 409 U.S. 524, 527 (1973). The *Ham* case holds that States, no less than federal courts, must ensure "essential demands of fairness." *Id.* at 526.

Trial counsel did not believe Judge Nielsen would ensure the essential demands of fairness; that is, determining whether potential jurors were racially prejudiced against Koreans. Trial counsel's predetermination was improper. It destroyed the Petitioner's opportunity for acquittal by a neutral, non-racially prejudiced jury. Trial counsel covertly promoted a belief that Koreans (and presumably other minorities) were not worthy of neutral jury consideration.

2. THE U.S. DISTRICT COURT ERRED AT THE 28 U.S.C. 2255 MOTION HEARING BY NOT FINDING A DENIAL OF PETITIONER'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BASED ON COUNSEL'S WAIVER OF JURY TRIAL BECAUSE COUNSEL BELIEVED A WEALTHY KOREAN CANNOT RECEIVE A FAIR JURY TRIAL IN SAN DIEGO.

Judges can commit errors of constitutional import. The instant case demonstrates the truth of that statement.

The judicial error committed in this case effectively denied the Petitioner a fair trial.

The discussion, *supra,* demonstrates that waiver of a jury trial or waiver of the right to testify are personal to the defendant. Counsel cannot waive these rights on behalf of the defendant. Waiver has serious and far-reaching ramifications. Therefore, waiver must be seriously considered by the court. For example, waiver of jury trial requires written stipulation by the defendant. *See, United States v. Taylor,* 498 F.2d 390 (6th Cir. 1974) (waiver of jury trial is a waiver of a basic and important right which cannot be accomplished on a silent record); *see, also, United States v. Ceja,* 451 F.2d 399 (1st Cir. 1971). Written stipulation ensures greater probability the defendant understood the effects of his waiver. *See, Pool v. United States,* 344 F.2d 943 (9th Cir.), *cert. denied,* 382 U.S. 832 (1965).

The preferred method for determining whether a defendant waived jury trial is through judicial interrogation. *United States v. David,* 511 F.2d 355 (D.C. Cir. 1975) illustrates the importance of this determination. The defendant in *David* was not able to make an intelligent, voluntary, and knowledgeable jury waiver because of a mental defect. The appellate court remanded the case for a new trial.

The Petitioner does not base his argument on mental defect. However, his situation parallels the *David* case. The Petitioner's waiver was no less intelligent, voluntary or knowledgeable. The Petitioner is a Korean-born, naturalized U.S. citizen. The Petitioner has a knowledge of the English language. However, the record amply indicates

his fluency in and understanding of the English language is *de minimus. See, Motion Transcript,* pp. 7, 15-16, 48, 57. In fact, the Petitioner required an interpreter at all judicial proceedings in order to make them understandable. *See, Motion Transcript,* p. 28.

The Petitioner does not demand any extraordinary treatment. The Petitioner merely asserts his baseline constitutional protection:

> [B]efore any waiver can become effective, the . . . duty of the trial court in that regard [obtaining express and intelligent consent of the defendant to waive jury trial] *is not to be discharged as a mere matter of rote, but with sound and advised discretion.*

Patton v. United States, 281 U.S. 276, 312-313 (1930) (emphasis added). Merely providing the court a written jury waiver does not ensure a knowing or intelligent waiver. *See, e.g., Estrada v. United States,* 457 F.2d 255 (7th Cir. 1970), *cert. denied,* 409 U.S. 858 (1972).

The *Estrada* court addressed the preferred procedure for proper jury waiver. *Estrada* adopted the American Bar Association recommendation:

> The Court should not accept a waiver unless the Defendant, after being advised by the court of the right to trial by jury, personally waives his right to trial by jury, either in writing or in open court for the record.

American Bar Association, *Standards for Criminal Justice,* ch. 15, sec. 1.2(b) (2nd ed. 1980) (supp. 1986). A careful colloquy between the judge and defendant serves three useful purposes. First, it facilitates review on appeal or

on collateral attack. There is a more complete factual basis for determining whether there was a voluntary waiver. Second, it provides an additional safeguard against a defendant's involuntary waiver of constitutional rights. Third, it minimizes any uncertainty resulting when a defendant relies solely on his attorney's explanation of the right to trial by jury and the consequences of waiver.

A litany of appellate decisions demonstrate the preference for careful questioning prior to waiver of a jury trial. *See, e.g., Roseman v. United States,* 364 F.2d 18 (9th Cir. 1966), *cert. denied,* 386 U.S. 918; *see, also, McCranie v. United States,* 333 F.2d 307 (5th Cir. 1964); *Dranow v. United States,* 325 F.2d 481 (8th Cir. 1963), *cert. denied,* 376 U.S. 912 (1964). Finally, the District of Columbia Court of Appeals states:

> Henceforth, in trials commenced after the issuance of this opinion, there should be in the record a statement in open court by the defendant himself in order to provide a basis for subsequently determining, if necessary, that he knowingly and voluntarily waived his constitutional right to trial by jury.

Jackson v. United States, 262 A.2d 106, 109 (D.C.App. 1970). Even the *government brief* in *Jackson* suggested the merits of direct communication between the defendant and judge *in addition* to written jury waiver. *Id.* at 108.

The District Court received the Petitioner's jury waiver. However, the judge never conducted any investigation to determine whether the Petitioner knowingly, intelligently and voluntarily relinquished his right to a

jury trial. The judge summarily dispensed with a basic procedure. *See, Motion Transcript*, pp. 1-2.

United States v. Radford, 452 F.2d 332 (7th Cir. 1971) holds that an effective jury waiver must be made intelligently and competently. Whether any particular waiver meets those tests is determined by the unique circumstances of each case. The appellate court upheld Radford's waiver only because *both* the trial judge and defense counsel questioned the defendant about his desire to waive jury trial. That is not the situation in the instant case. Neither Judge Nielsen nor the Petitioner's attorney questioned Jung about his waiver.

The act of questioning a defendant is particularly crucial in situations where there is doubt about the validity of a waiver. *United States v. David*, 511 F.2d 355 (D.C. Cir. 1975). The instant case presents a "particularly crucial" situation. The Petitioner is a Korean-born, naturalized citizen. There was considerable doubt about his ability to understand English. Showing great deference to education and authority is an Oriental character trait. The Petitioner's respect for his attorney militated against the decision to waive a jury. Any one of these problems, standing alone, suggests a preference for judicial communication concerning jury waiver.

The District Court's actions vitiated a knowing, competent and intelligent waiver of jury trial. This error was not corrected at the 28 U.S.C. sec. 2255 hearing. The error occurred because of the summary conclusion a waiver colloquy was unnecessary.

The Ninth Circuit clearly favors a jury waiver colloquy. "We strongly believe that trial courts should conduct

colloquies with the defendant before accepting a waiver of the right to jury trial." *United States v. Cochran*, 770 F.2d 850, 852 (9th Cir. 1985). Even when the defendant signed a written waiver,

> it is better practice for a district judge when advised by a defendant that he desires to waive his right to jury trial, to interrogate the defendant so as to satisfy himself that the defendant is fully apprised of his rights and freely and voluntarily desires to relinquish them.

United States v. Reyes, 603 F.2d-69, 71 (9th Cir. 1979).

The Petitioner demonstrates prejudice of his constitutional rights in the 28 U.S.C. sec 2255 hearing. The District Court refused to reconsider the contention the Petitioner was denied effective assistance of counsel. This is palpably harmful. The District Court's actions denied the Petitioner's jury trial rights. The District Court's conduct caused an unknowing, involuntary and unintelligent waiver of the Petitioner's rights. This Court must overrule the District Court's 28 U.S.C. sec 2255 findings and conclusions.

Claims challenging effective assistance of counsel are presumptively prejudicial. This is because of the importance attached to ineffective assistance claims. Ineffective assistance cases reflect instances affecting the ability of the accused to have a fair trial. This includes cases where counsel's ineffective representation is functionally equivalent to no representation at all. The instant case is an example of this type of situation. It is the trial judge's responsibility to monitor the proceedings. He must assure that constitutional mandates are not circumscribed.

Trial counsel put the Petitioner in an untenable position. The attorney said that *wealthy Koreans could not expect a fair trial from a jury.* Counsel did not explain the concept of trial by jury, the attendant advantages and disadvantages, or any other matter associated with this right. Defense counsel merely concluded the Petitioner could not expect a fair jury trial. Counsel did not permit the Petitioner to make an informed, intelligent, voluntary, and un-coerced waiver of his constitutional rights. In our system of justice, the defense counsel's suggestion is reprehensible. Defense counsel's statements should be deemed impermissible, *per se,* in a system which carefully fosters procedures to ensure a fair *jury* trial. *See, e.g., United States v. DeGross,* 913 F.2d 1419 (9th Cir. 1990).

A judicial discussion would have elicited that a problem existed. The court is not required to monitor everything that goes on between an attorney and his client. Judges, however, must monitor situations which encompass problems of constitutional import. Waiver of jury trial is a situation requiring judicial oversight. At trial, Judge Nielsen failed to remedy this important problem.

Further, Judge Nielsen did not address the ineffective assistance claim during the 28 U.S.C. sec. 2255 hearing. Judge Nielsen merely makes a conclusory comment:

> I just don't believe, hearing the evidence and recalling the evidence at trial, I cannot find that incompetence of counsel was a cause of Mr. Jung's waiver of jury. And I'm not at all sure, as I indicated originally, that he ever made a mistake anyway in the waiver of jury . . . I can't find that Mr. Sheela overpowered his intellect and

> psyche and forced him to waive a jury for an improper reason. I cannot so find.

Motion Transcript, p. 66

The Court tacitly admits error in the 28 U.S.C. sec. 2255 hearing:

> Counsel [Goodman]: And I think that in the – I've learned from it I'll never be a judge, but if I were a judge, I think, in a similar situation faced with somebody like Mr. Jung I would have gone beyond a summary canvassing of him.
>
> Court: If I'm ever faced with it again, having had the problem put to me by somebody with as much experience as you have, Mr. Goodman, I may very well go further. But I'll tell you until your argument here today, if I were faced with it, I would do exactly what I did before.

Motion Transcript, pp. 60-61.

The Petitioner does not claim a judge must affirmatively assert a defendant's rights. However, the evidence clearly demonstrates ineffective assistance. Judge Nielsen did not intervene and assert the baseline constitutional provision afforded every defendant. This conduct cannot be condoned.

The analysis of any ineffective assistance claim begins with the constitutional guarantee, "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The right to counsel demands an *effective* representation. *See, McMann v. Richardson*, 397 U.S. 759 (1970).

The rationale of the defense attorney (accepted by the District Court) is a person of Korean extraction could not receive a fair trial in San Diego. This demonstrates unreasonable performance. Our democracy demands equality before the law. The Constitution does not differentiate between persons based on race, religion, national origin, or sex. *See, generally,* U.S. Const. arts 1-7, amend. I-XXVI.

Judge Nielsen was not concerned with the Petitioner's perception about the inherent fairness of the judicial process. Judge Nielsen exacerbated the impression that Orientals (and presumably other minorities) could not get a fair jury trial. This perception is the antithesis of our democratic ideals. When a judge does not thwart this impression, he perverts judicial integrity.

CONCLUSION

This case clearly evidences ineffective assistance of counsel. By affirmative action, counsel told the Petitioner he could not get a fair trial because of his heritage. This advice demonstrates the first prong of an ineffective assistance claim, objectively unreasonable performance.

The second prong of the ineffective assistance claim is evident because, (1.) the Petitioner proceeded to trial without understanding the extent of his constitutional rights, (2.) it was impossible for the Petitioner to make informed decisions about his trial, and, (3.) the Petitioner was unable to effectively participate in his defense.

In this case, defense counsel effectively persuaded the Petitioner he could not get a fair trial. In counsel's

estimation (and with Judge Nielsen's acquiescence), Orientals are not considered worthy of neutral jury consideration. When evidence at the motion hearing adduced this, Judge Nielsen did nothing to dissuade the impression. The actions of the Petitioner's attorney undermines the foundation of our judicial system. When a judge does not affirmatively remedy these egregious problems, he disadvantages considerably more than the defendant at bar.

The Petitioner respectfully requests this Court to determine that the District Court erred in not finding a violation of the Petitioner's constitutionally guaranteed right to, (1.) an informed, intelligent, and knowing waiver of jury trial, and (2.) an effective assistance of counsel.

Owing to the constitutional infirmities surrounding the Petitioner's trial and subsequent 28 U.S.C. sec. 2255 motion and hearing, the Petitioner respectfully requests this Court reverse his conviction.

Respectfully Submitted,

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Attorney for Petitioner:
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Charles Jung

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

YEE SOON SHIN and Yong Woo Jung,
aka Charles Jung, Defendants-
Appellants.

Nos. 90-50604, 90-50623.

United States Court of Appeals,
Ninth Circuit.

Submitted Sept. 12, 1991.*

Decided Jan. 10, 1992

Oscar B. Goodman, Goodman, Stein, Chesnoff & Quintana, Las Vegas, Nev., for defendants-appellants Yong Woo Jung and Yee Soon Shin.

L.J. O'Neale, Asst. U.S. Atty., San Diego, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of California.

Before BEEZER, HALL and WIGGINS, Circuit Judges.

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*The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed.R.App.P. 34(a).

BEEZER, Circuit Judge:

Yee Soon Shin and Yong Woo Jung were convicted of conspiracy, failure to file currency transaction reports and structuring financial transactions to avoid currency reporting requirements. Jung was also convicted of money laundering. Shin and Jung appeal their convictions and their sentences. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I

Shin's notice of appeal states that Shin "appeals to the United States Court of Appeals for the Ninth Circuit from the sentence imposed on October 9, 1990." Her brief raises issues unrelated to her sentence.

Under Fed.R.App.P. 9(c), the notice of appeal "shall designate the judgment, order or part thereof appealed from." This circuit has held that a mistake in designating the judgment appealed from does not bar an appeal if the intent to appeal a specific judgment can be inferred and the appellee is not prejudiced or misled by the mistake. *Lockman Found v. Evangelical Alliance Mission*, 930 F.2d 764, 772 (9th Cir.1991). Where the appellee has argued the merits fully in its brief, it has not been prejudiced by the appellant's failure to designate specifically an order which is subject to appeal. *United States v. Walker*, 601 F.2d 1051, 1058 (9th Cir.1979). In this case, the United States fully briefed the merits of Shin's arguments unrelated to her sentence.

II

Shin and Jung contend that the district court erred by failing to assign separate interpreters at trial. A criminal defendant who "speaks only or primarily a language other than the English language" has a statutory right under the Court Interpreters Act to a court-appointed interpreter when his comprehension of the proceedings or ability to communicate with counsel is impaired. 28 U.S.C. § 1827(d)(1). The Court Interpreters Act does not, however, require separate interpreters for each defendant in multidefendant cases. *See United States v. Bennett*, 848 F.2d 1134, 1140-41 (11th Cir. 1988); *United States v. Sanchez*, 928 F.2d 1450, 1455 (6th Cir. 1991).

Shin and Jung also contend that sharing one interpreter violated their rights under the Fifth and Sixth Amendments. As a constitutional matter, the appointment of interpreters is within the district court's discretion. *United States v. Bennett*, 848 F.2d at 1141. Appellants did not object in the district court. A lack of objection weighs against a finding of abuse of discretion by the trial court. *United States v. Lim*, 794 F.2d 469, 471 (9th Cir.), *cert. denied*, 479 U.S. 937, 107 S.Ct. 416, 93 L.Ed.2d 367 (1986); *Valladares v. United States*, 871 F.2d 1564, 1566 (11th Cir.1989). Because appellants did not object, the district court did not abuse its discretion in assigning one interpreter.

Shin and Jung also contend that the translation provided by the interpreter was inadequate and that the audio equipment used by the interpreter was defective. The record on appeal provides no factual support for appellants' contentions. If there are facts outside the

record which would support appellants' contentions, they must be presented in an application under 28 U.S.C. § 2255. *United States v. Cochran*, 770 F.2d 850, 851 n. 1 (9th Cir.1985).

III

Shin and Jung contend that the district court erred by accepting jury waivers that were not knowing, voluntary and intelligent. Appellants contend that the district court failed to advise the appellants that they could participate in jury selection, failed to advise appellants that they could testify at trial and failed to provide an interpreter to translate when appellants waived their right to a jury trial.

Appellants filed written jury trial waivers. The district court also interrogated appellants prior to accepting their jury waivers. the district court did not err by failing to inform appellants that they could participate in jury selection. Knowledge of the right to participate in the selection of jurors is not constitutionally required for a knowing, voluntary and intelligent jury waiver. *United States ex rel. Wandick v. Chrans*, 869 F.2d 1084, 1088 (7th Cir.1989). The district court did not err by failing to inform appellants of their right to testify. The district court has no duty to advise a defendant of his right to testify. *Ortega v. O'Leary*, 843 F.2d 258, 261 (7th Cir.) *cert. denied*, 488 U.S. 841, 109 S.Ct. 110, 102 L.Ed.2d 85 (1988); *Siciliano v. Vose*, 834 F.2d 29, 30-31 (1st Cir.1987); *United States v. Bernloehr*, 833 F.2d 749, 751-52 (8th Cir.1987); *United States v. Janoe*, 720 F.2d 1156, 1161 (10th Cir.1983),

cert. denied, 465 U.S. 1036, 104 S.Ct. 1310, 79 L.Ed.2d 707 (1984).

Shin and Jung also contend that the district court did not provide an interpreter when they waived their right to a jury trial. However, no objection was made and there are no facts in the record bearing on the issue whether an interpreter translated when appellants waived their right to a jury trial. If there are facts outside the record which would support appellants' contentions, they must be presented in an application under 28 U.S.C. § 2255. *United States v. Cochran*, 770 F.2d at 851 n. 1.

IV

Shin and Jung finally contend that the district court erred in calculating their sentences under the Sentencing Guidelines. Specifically, Shin and Jung contend that the district court erred by aggregating the currency exchanged in the various transactions for which Shin and Jung were convicted.

This court reviews de novo the district court's interpretation of the Sentencing Guidelines. *United States v. Restrepo*, 884 F.2d 1294, 1295 (9th Cir.1989).

For purposes of sentencing, the district court must group money laundering counts and counts involving the failure to file currency transaction reports. U.S.S.G. § 3D1.2(d). The appropriate offense level for grouped offenses is the offense level corresponding to the aggregated quantity of all grouped counts. *Id.* § 3D1.3(b). Consequently, the argument that the district court erred by

aggregating the currency exchanged in the money laundering counts and counts involving the failure to file currency transactions reports is without merit.

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

YONG WOO JUNG, aka Charles Jung, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendant-Appellee.	No. 92-55562 D.C. No. CV-92-175-LCN MEMORANDUM* (Filed Feb. 11, 1993)

Appeal from the United States District Court
for the Southern District of California
Leland C. Nielsen, Senior District Judge, Presiding

Argued and Submitted February 5, 1993
Pasadena, California

Before: BEEZER, BRUNETTI and THOMPSON, Circuit Judges.

After a bench trial, appellant Yong Woo Jung was convicted of one count of conspiracy to fail to file currency transaction reports, in violation of 18 U.S.C. § 371 and 31 U.S.C. § 5313(a); seventeen counts of failure to file currency transaction reports, in violation of 31 U.S.C. §§ 5313(a) and 5322(b) and 18 U.S.C. § 2; ten counts of

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

money laundering, in violation of 18 U.S.C. §§ 1956(a)(3)(C) and 2; and one count of structuring transactions to evade reporting requirements, in violation of 31 U.S.C. § 5324(3) and 18 U.S.C. § 2. Jung appealed his conviction and sentence and we affirmed. *United States v. Jung, sub nom, United States v. Shin*, 953 F.2d 559 (9th Cir. 1992). Jung then filed a motion in the district court, under 28 U.S.C. § 2255, to set aside the judgment. The district court denied relief after an evidentiary hearing.

Jung appeals the district court's denial of his section 2255 motion, arguing he was denied effective assistance of counsel in violation of his sixth amendment rights. The government argues the issues underlying Jung's section 2255 motion were decided on direct appeal and cannot be collaterally attacked. Notice of appeal was timely filed. We have jurisdiction pursuant to 28 U.S.C. § 2255. We affirm.

1. Propriety of Collateral Attack

Jung's ineffective assistance of counsel claims, raised in his section 2255 motion, are properly before this court. Section 2255 motions, like habeas corpus petitions, are "well established exception[s] to the principles of res judicata." *Walter v. United States*, 969 F.2d 814, 816 (9th Cir. 1992); *see also Sanders v. United States*, 373 U.S. 1, 8 (1963) ("Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."). To prevent abuse of the writ, however, the federal court retains discretion to refuse to consider a claim presented in a section 2255 petition if the claim has been previously

presented. *Walter*, 969 F.2d at 816. Because Jung's ineffective assistance of counsel claims were not argued in his direct appeal, the issues he raises in his section 2255 motion are not precluded from our review. *See Shin*, 953 F.2d at 561.

2. Ineffective Assistance of Counsel

We review de novo the denial of a section 2255 motion to vacate judgment. *United States v. Quan*, 789 F.2d 711, 713 (9th Cir.), *cert. dismissed*, 478 U.S. 1033 (1986). We defer to a district court's findings of fact absent a determination that they are clearly erroneous, but apply our own judgment as to whether the conduct determined by those facts constitutes ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 698 (1984).

To establish ineffective assistance of counsel requiring reversal of a conviction, a criminal defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. Prejudice can be presumed only "where there has been an actual breakdown in the adversarial process at trial." *Toomey v. Bunnell*, 898 F.2d 741, 744 n.2 (9th Cir.), *cert. denied*, 111 S.Ct. 390 (1990); *see also United States v. Cronic*, 466 U.S. 648 (1984).

To establish deficient performance under *Strickland*, it must be shown "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the

circumstances." *Id.* at 688. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689.

Jung contends he was denied effective assistance of counsel because (a) his trial counsel pressured him to waive a jury trial by telling him he could not get a fair trial from a jury because of his Korean background, and (b) his trial counsel did not properly advise him of his right to testify in his own behalf.

a. Jury Trial Waiver

The district court, after weighing the credibility of the witnesses, found as a factual matter that:

> [T]he defendant was . . . advised of the factors involved in waiving trial by jury. The question of the defendant's ethnic background was simply one of the factors discussed. . . .

Upon review of the record of the evidentiary hearing, we cannot say the district court's findings of fact are clearly erroneous. At the hearing, Jung's trial counsel testified that he advised Jung to waive a jury trial not only because of Jung's Korean background, but also because a judge might be less inclined to focus on the drug aspects of the money laundering allegations, a judge might be more understanding of Jung's tendency to answer questions before they were interpreted, and a judge might more easily set aside the substantial publicity then surrounding another money laundering prosecution in San Diego. Trial counsel further testified that he never threatened Jung to get him to consent to the jury trial waiver. It was trial counsel's belief that Jung knowingly waived jury trial pursuant to his advice.

We conclude that trial counsel's performance was reasonable in advising Jung to waive trial by jury. *See Strickland*, 466 U.S. at 688. Because trial counsel's performance was not deficient, we need not consider whether Jung's defense was prejudiced.

b. Right to Testify

The district court, after weighing the credibility of the witnesses, found as a factual matter that:

> [T]he defendant's trial counsel did in fact consult with the defendant extensively as to whether or not the defendant should testify at trial, and that the defendant chose to exercise his right not to testify.

Upon review of the record of the evidentiary hearing, we cannot say these findings of fact are clearly erroneous. At the hearing, Jung's trial counsel testified that he discussed at some length with Jung whether or not Jung should testify, and after mock examinations and cross-examinations, trial counsel concluded that Jung would be a bad witness. Further, trial counsel testified that Jung expressed concern that should he take the witness stand, he could and would be cross-examined about conversations he might have had with his codefendant wife, and this could strengthen the government's case against her. Trial counsel testified that Jung expressed an unwillingness to testify if it might put his wife in further jeopardy. We conclude that trial counsel's performance in advising Jung regarding his right to testify was not deficient. We need not address the prejudice prong in *Strickland*.

AFFIRMED.